IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

WEDNESDAY, THE 19TH SEPTEMBER 2007 / 28TH BHADRA 1929

CRL.A.No. 1276 of 2003()

ORDER IN CRLP.68/2003 Dated 11/06/2003
CC.223/1999 of JUDL.MAGISTRATE OF FIRST CLASS, PALA

.....

APPELLANT: COMPLAINANT:

VIN C.JOSE, S/O. JOSEPH,
CHITTETHU HOUSE, KIZHATHADIYOOR KARA,
LALAM VILLAGE, PALAI, KOTTAYAM.

BY ADV. SRI.JOHNSON MANAYANI
SRI.GEORGE KURUVILLA(ALAPPUZHA)

RESPONDENTS: ACCUSED & STATE:

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1. MRS.LISSIAMMA GEORGE,
STATE BANK OF TRAVANCORE, MAIN ROAD, PALA.

2. STATE OF KERALA,
REP. BY ITS PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.M.NARENDRA KUMAR
SMT.LEENA KRISHNAN
PUBLIC PROSECUTOR, SRI AMJAD ALI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/09/2007, THE COURT ON 19/09/2007 DELIVERED THE FOLLOWING:

K.R.UDAYABHANU, J.

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Crl.A.No.1276 of 2003-B

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Dated this the 19th day of September, 2007

J U D G M E N T

The appellant is the complainant in C.C.No.223/1999 the proceedings initiated alleging offence under Section 138 of the Negotiable Instruments Act, in which the accused was acquitted.

2. The case of the complainant is that the accused borrowed a sum of Rs.2,00,000/- from the complainant, which was borrowed on different occasions, and when the amount was demanded, the accused issued the impugned cheque on 01/09/1998, dated 15/09/1998. The cheque when presented got dishonoured for want of funds in the account of the accused.

3. The evidence adduced in the matter consisted of the testimony of PW.1 and Exts.P1 to P9. The defence examined DWs.1 to 3 and got marked Exts.D1 to D10. Of the defence witnesses examined DW.1 is

the accused herself, DW.2 is the sister-in-law of the complainant and DW.3 is the brother of the complainant who is the husband of DW.2.

4. The trial court came down heavily on the complainant on a number of grounds. It was found that DW.3, the brother of the complainant has deliberately affixed his thumb impression on the summons received in order to hide his handwriting. It was found that the handwriting in Ext.P1 cheque is the same as the one seen in Ext.D10 cheque presented by DW.2, the wife of DW.3, which has given rise to another proceedings. The explanation of DW.3 that he was afflicted by parkinson's disease and hence affixed the thumb impression was also commented upon adversely as according to the court he has signed in a proper manner in the deposition. It was also observed that the complainant who has been examined as PW.1 has stated in the chief examination that the cheque was issued on 01/09/1998 and that after nine months when he was examined in cross, he changed the date of issuance as 01/08/1998 in order to get over the contingency as DW.1 had produced her passport and the air tickets in the cases initiated by the sister-in-law of the complainant, which would show that the accused was in Kuwait on 01/09/1998.

5. Of course, I find it difficult to agree with the observation of the court below that the handwriting in Exts.P1 and D10 is similar. The handwritings in the above cheques appear different. I am unable to subscribe the view expressed by the court in this regard. All the same, on an examination of the evidence adduced, I find that the version of the defence is more probable. It is the version of DW.1, who is employed in a nationalised bank, that is, S.B.T that she had no dealings with the complainant herein; that she is not acquainted with the complainant; that she is seeing him for the first time in the court. But she had dealings with DW.3, the brother of the complainant. She has stated that DW.3 is a financier. According to her on 07/11/1992, she had borrowed Rs.75,000/- from DW.3 agreeing to pay interest at the rate of 36% per annum and as security she had handed over two cheques bearing Nos.511585 and 511587, which were issued in the name of his wife that is DW.2 with the amounts mentioned as Rs.5000/- and Rs.70,000/- respectively and without putting the dates. Ext.D8 is the copy of the cheque with number 511587. She was paying interest regularly. When there was default in remitting the interest, DW.3 encashed the cheque No.511585 for Rs.5000/- on 28/06/1995. The above is evident from Ext.D2, the ledger folio of her account with S.B.T, Pala. Thereafter, at the insistence of DW.3 she

issued three blank cheques as security, which are cheque Nos.764632, 764633 and 764634. Thereafter, when payment of interest was defaulted, cheque No.764634 was presented by DW.3 inserting the name of his wife, that is DW.2 and putting a sum of Rs.4,00,000/-. The same was dishonoured and a lawyer notice was sent demanding the amount. On receipt of the lawyer notice, she settled the matter by paying Rs.45,000/- on 28/08/1998. The above payment is evident from Ext.P8, the copy of the ledger folio. Thereafter, cheque No.764632 was presented inserting a sum of Rs.2,00,000/- and the name of the wife of DW.3 and, cheque No.511587 which is for Rs.70,000/- was also presented and two criminal cases were filed in the Chief Judicial Magistrate Court, Kottayam, vide C.C.No.161/1998 (with respect to cheque No.511587) and C.C.No.162/1998 (with respect to cheque No.764632). The copies of the complaints are Exts.D7 and D9. Ext.P1 is the instant cheque No.764633 which is presented putting the date 15/09/1998 and inserting a sum of Rs.2,00,000/- and in the name of the brother of DW.3.

The observation of the court below as to the twisting of the date when DW.3 was examined after about nine months subsequent to his

chief examination as per which he has advanced the date by one month, that is, 01/08/1998, I find is fully correct. DW.1 had produced her passport and air tickets in the proceedings in C.C.No.161/1998 and C.C.No.162/1998. The above turn around by PW.1 itself reveals the falsity of the case set up by PW.1, the complainant. The fact that cheque No.764632 involved in C.C.No.162/1998 and the impugned cheque, i.e., cheque No.764633 and, the cheque No.764634 presented by DW.2 inserting sum of Rs.4,00,000/- are consecutive and serially numbered cheques also indicate that the case set up by the defence is more probable. In the circumstances, I find that the findings of the courts below are only to be upheld.

In the circumstances, the appeal is dismissed.

K.R.UDAYABHANU,
Judge

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K.R.UDAYABHANU, J.

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Crl.A.No.1276 of 2003-B

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J U D G M E N T

19th September, 2007